

USAC's Flawed Policy Denies Locus Telecommunications and an Entire Class of Similarly-Situated Private and Common Carriers De-Regulatory Benefits Intended by Congress

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Takeaways

1. Congress, Courts and the FCC have recognized the Private Carriage exemption from heavy-handed Title II regulation since passage of the 1996 Act
 - *Ignored or purposefully blurred by past Commissions*
 - *Overlooked or avoided by large swaths of industry due to:*
 - Uncertainties – Will FCC Agree?
 - Uneven rules – Exemption exists for Telcos, but not I-VolP
 - Unclear rules – USAC does not facilitate revenue separation via Form 499
 - Fear of enforcement and adverse economic consequences
2. Clarifying purpose, scope and availability of Private Carrier exemption to telcos, extending exemption to I-VolP and resolving Form 499 revenue reporting concerns will:
 - *Effectively reduce government regulations,*
 - *Increase competition and growth, and*
 - *Lead to market-based discipline*

Takeaways, continued

3. Role of Private Carriers in Telecommunications Marketplace
 - *Differences between private and common carriage*
 - *Congressional intent*
 - *Public Policy supporting private carriage*
 - *Rights of private carriers*
4. Specific challenges inhibiting broader adoption of Private Carriage business model
 - *USAC policies*
 - *Uneven regulatory classification of I-VoIP*
 - *Overall uncertainty*
5. Today's Meeting will focus on USAC
 - *Current policies are unfavorable to companies reporting **both** common and private carriage in the same year*
 - *Policies contradict precedent*
 - *USAC should comply; Carriers should not be forced to contort*

Our Interest

- We appear on behalf of Locus Telecommunications, wholly-owned subsidiary of KDDI America and KDDI Japan
 - *2015: Locus sold services on common and private carriage basis*
 - Carrier Voice Termination Services – 100% Private Carriage
 - Prepaid Calling Cards – Mix of Private Carriage and Common Carriage
 - Prepaid Wireless – 100% Common Carriage
 - *Line 105: Listed Categories by Revenue (per USAC directive):*
 1. Cellular/PCS/SMR (prepaid wireless)
 2. **Private service provider**
 3. Prepaid card
 4. Toll Reseller services
 - *Line 603: Indicated partial exemption from NANPA, TRS, LNP*
 - *Billed based on total (private and common carriage) revenue by TRS/LNP administrators*
- Nov 21, 2016: Locus appeals to FCC (pending in Docket 06-122)
- Nov 22, 2016: Locus files Petition for Declaratory Ruling (not yet publicly noticed)
- Today: No FCC action taken on either petition

Private Carrier Exemption

- Revenue derived from private carriage offerings **is subject to** direct Universal Service Fund (USF) contributions pursuant to Section 254(d)
- However, revenue from private carriage offerings **is exempt from** all non-Universal Service Fund, Title II fees including:
 - *Telecommunications Relay Services (TRS) fund*
 - *Local Number Portability (LNP) administration*
 - *North American Numbering Plan (NANPA) administration*
- Furthermore, to the extent a service provider is operating in its capacity as a private carrier (i.e., in relation to its private carriage offerings), the service provider **is exempt from** other Title II regulations, not expressly extended by the FCC.

Problem

- USAC shares FCC Form 499-A revenue data with the administrators of the Title II Programs based exclusively on the **primary** service category identified in Line 105 of the Form.

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see instructions.]				
<input type="checkbox"/> Audio Bridging (teleconferencing) Provider	<input type="checkbox"/> CAP/CLEC	2 Cellular/PCS/SMR (wireless telephony inc. by resale)		
<input type="checkbox"/> Coaxial Cable	<input type="checkbox"/> Incumbent LEC	<input type="checkbox"/> Interconnected VoIP	<input type="checkbox"/> Interexchange Carrier (IXC)	<input type="checkbox"/> Local Reseller
<input type="checkbox"/> Non-Interconnected VoIP	<input type="checkbox"/> Operator Service Provider	<input type="checkbox"/> Paging & Messaging	<input type="checkbox"/> Payphone Service Provider	<input type="checkbox"/> Prepaid Card
1 <input checked="" type="checkbox"/> Private Service Provider	<input type="checkbox"/> Satellite Service Provider	<input type="checkbox"/> Shared-Tenant Service Provider / Building LEC	<input type="checkbox"/> SMR (dispatch)	
<input type="checkbox"/> Toll Reseller	<input type="checkbox"/> Wireless Data	<input type="checkbox"/> Other Local	<input type="checkbox"/> Other Mobile	<input type="checkbox"/> Other Toll
If Other Local, Other Mobile or Other Toll is checked describe carrier type / services provided:				
106.1 Affiliated Filers Name/Holding Company Name (All affiliated companies must show the same name on this line.)			Check if filer has no affiliates <input type="checkbox"/>	

- If a service provider enters "1" next to Private Service Provider, USAC refrains from sharing 499-A revenue data with all Title II Program administrators (even if the service provider also offers any number of common carrier services).
- Results of current USAC policy:
 - Allows "gaming" of system that deprives Title II programs of funding from legitimate common carrier revenue.
 - Imputes higher costs on service providers with common carrier revenues subject to funding obligations.

Problem, continued

- USAC shares FCC Form 499-A revenue data with the administrators of the Title II Programs based exclusively on the **primary** service category identified in Line 105 of the Form.

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see instructions.]				
<input type="checkbox"/> Audio Bridging (teleconferencing) Provider	<input type="checkbox"/> CAP/CLEC	<input checked="" type="checkbox"/> Cellular/PCS/SMR (wireless telephony inc. by resale)		
<input type="checkbox"/> Coaxial Cable	<input type="checkbox"/> Incumbent LEC	<input type="checkbox"/> Interconnected VoIP	<input type="checkbox"/> Interexchange Carrier (IXC)	<input type="checkbox"/> Local Reseller
<input type="checkbox"/> Non-Interconnected VoIP	<input type="checkbox"/> Operator Service Provider	<input type="checkbox"/> Paging & Messaging	<input type="checkbox"/> Payphone Service Provider	<input type="checkbox"/> Prepaid Card
<input checked="" type="checkbox"/> Private Service Provider	<input type="checkbox"/> Satellite Service Provider	<input type="checkbox"/> Shared-Tenant Service Provider / Building LEC	<input type="checkbox"/> SMR (dispatch)	
<input type="checkbox"/> Toll Reseller	<input type="checkbox"/> Wireless Data	<input type="checkbox"/> Other Local	<input type="checkbox"/> Other Mobile	<input type="checkbox"/> Other Toll
If Other Local, Other Mobile or Other Toll is checked describe carrier type / services provided:				
106.1 Affiliated Filers Name/Holding Company Name (All affiliated companies must show the same name on this line.)			Check if filer has no affiliates <input type="checkbox"/>	

- However, a service provider (like Locus) that derives revenue from **both** private and common carrier services, but whose private carrier revenue is not #1 in "Importance" (i.e., magnitude) cannot truthfully enter "1" next to Private Service Provider.
- Therefore, USAC **does** share private carrier revenue data with Title II Program administrators.
- Result of current USAC policy:
 - Locus invoiced Title II fees on "exempt" private carrier revenue.

Problem, continued

- With knowledge of USAC's policy concerning Line 105, Locus sought to exclude private carrier revenue from the amount USAC shares with the Title II Program administrators through the process "seemingly" available via Line 603:

Section IV of the instructions provides information on which types of filers are required to file for which purposes. Any filer claiming to be exempt from one or more contribution requirements should so certify below and attach an explanation. [The Universal Service Administrator will determine which filers meet the *de minimis* threshold based on information provided in Block 4, even if you fail to so certify below.]

603

I certify that the filer is exempt from contributing to:

Universal Service ☐

TRS ☒

NANPA ☒

LNP Administration ☒

Provide explanation below:

[Locus identified its private carrier revenue and provided a detailed explanation supporting the exclusion of said revenue from Title II Programs]

- USAC refused to exclude the private carrier revenue from the amounts shared with the Title II Program administrators.
- Result of USAC decision:
 - Locus invoiced Title II fees on "exempt" private carrier revenue.

Our Request(s)

- Locus asks the Commission to:
 - *Immediately direct USAC to retroactively correct its policies to ensure compliance with unambiguous law and regulations governing the exemption of private carrier revenue from Communications Act impositions; OR*
 - *Grant the relief requested by Locus in its pending “Request for Review” of Decisions of the Title II Program Administrators (Docket 06-122), AND/OR*
 - *Open a proceeding to consider Locus’ Petition for Declaratory Ruling*

Broader Industry and Governmental Interests in Issues Identified by Locus

- The issue is not unique to Locus.
 - *In this case, a common carrier with some private carriage revenues was over-billed.*
 - *In other cases, possible for a private carrier with some common carriage revenues to be under-billed.*
- Broad de-regulatory opportunity through private carriage exemption.
- FCC/USAC should clarify this issue, with attention to the **Law and Precedent relating to Private Carriage.**

Let's go back to the beginning...

Deregulatory Approach of '96 Act

- ✓ Forbearance Authority
- ✓ Emphasis on competition
- ✓ Preserved distinction between private and common carriage
 - “Telecommunications” – *“the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”* 47 U.S.C. § 153(43).
 - “Telecommunications Service” – *“the offering of telecommunications **for a fee directly to the public**, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”* 47 U.S.C. § 153(46).
 - “Telecommunications carrier” – *“any provider of telecommunications services...”; “a telecommunications carrier shall be treated as a common carrier under this Act **only to the extent that it is engaged in providing telecommunications services...**”* 47 U.S.C. § 153(51).

Benefits of Private Carriage

- Flexibility to customize deals: pricing, conditions, choice of customers
- Allows savvy customers to leverage price and quality competition
- Promotes risk taking in private arrangements
- Creates competitive effects that reduce prices
 - *With common carriage, knowledge of competitor prices can result in pricing above competitive levels (due to tacit collusion where retaliation more easily achievable)*
 - *No impact of detariffing here. Common carriers must still make pricing available.*
- Hybrid system: retains common carriage for services made available to a wide customer base
 - *Promotes essential services, interconnectivity*
 - *Spreads basic infrastructure*

Legal Precedent

- Common carriers “serve all potential customers indifferently,” whereas private carriers “make individualized decisions...whether and on what terms to deal.” *National Ass’n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 644, n. 76 (D.C. Cir. 1976).
- Doctrine of common carriage imported from England; imposes a greater standard of care upon carriers who hold themselves out as offering to serve the public in general.
- **Carriers may operate as private service providers with respect to some services and common carriers with respect to others.** *National Ass’n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976); see also *In re Audio Comm’cns, Inc.*, 8 FCC Rcd. 8697, 8698-99 (1993) (“[A] single firm that is a common carrier in some roles need not be a common carrier in other roles.”).

Example

- Private carriers offer services to select customers based upon individually negotiated terms.
- “Wholesale” agreements between carriers:
 - *Some carriers sell excess capacity, or negotiate traffic exchange agreements with other carriers.*
 - *Negotiate individual terms and do not “hold themselves out.”*

Private or Common Carriage – Factors

- ✓ Individually negotiated contracts with each customer rather than offerings with set prices and terms.
- ✓ Customers that are sophisticated business entities.
- ✓ Medium-to-long term contracts with a relatively stable customer base.
- ✓ Extent to which customers using the service have unique communications requirements.
- ✓ Offerings tailored to the special requirements of each customer.
- ✓ Keeping contracts confidential.

Big Picture

- Given the benefits, the FCC should consider drawing clearer bright lines that distinguish private carriage and common carriage.
 - *Open Internet Order: Created a dichotomy between services that are and are not “mass market” services*
 - *I-VolP: private carriage “status” currently unavailable*
- Carriers offering both common and private carriage services must continue to be exempt from non-USF contributions for private carriage offerings.
 - *Corporate restructuring to avoid paying TRS/LNP/NANPA on private carriage services is an option, but this is not consistent with the Act, FCC’s existing law, and precedent.*
 - *FCC emphasizes common carriage is about how the company offers the given service.*

Private Carriage as a De-Regulatory Opportunity

- Administration has pledged to cut red tape and regulations (by over 70%).
- Promotion and clarification of private carriage exemption good for:
 - *Competition*
 - *Driving new business ventures and creative service delivery models*
 - *Sophisticated customers*
 - *Companies seeking to fill niche markets*
- Achieving benefits of private carriage exemption requires greater clarity and certainty, especially regarding treatment of revenues for companies offering services on common carriage and private carriage basis.